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STATE OF NORTH DAKOTA

AUG 25 2016

STATE OF NORTH DAKOTA

Environmental Driven Solutions, LLC,)

Supreme Court No. 20160100

Plaintiff and Appellee,)

Dunn County

v.)

No. 13-2013-CV-100

Dunn County, a North Dakota Municipality,)

Defendant and Appellant,)

v.)

North Dakota Industrial Commission,)

Intervenor and Appellee.)

APPELLEE'S BRIEF

APPEAL FROM JUDGMENT
DATED MARCH 3, 2016
DISTRICT COURT, SOUTHWEST JUDICIAL DISTRICT
DUNN COUNTY, NORTH DAKOTA
THE HONORABLE DANN EDWARD GREENWOOD

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STATEMENT OF THE ISSUES

[¶1] Environmental Driven Solutions, LLC (“EDS”) received a permit for a waste oil treating plant from the North Dakota Industrial Commission (“NDIC”). Dunn County insisted its zoning regulations applied to the treating plant, but would not grant a permit. The district court concluded state law preempted local zoning regulations. Did the district court properly conclude state law preempts local zoning regulations for treating plants?

STATEMENT OF THE FACTS

[¶2] EDS applied for approval of a waste oil treating plant with the NDIC to be operated on a portion of property located in Dunn County, North Dakota. EDS Appendix (“EDS App.”) 1-29. The property is more fully described as:

Township 145 North, Range 97 West of the 5th P.M.
Section 30: NE/4

(“Subject Property”).

[¶3] After a hearing, the NDIC issued an Order permitting the treating plant within the Subject Property. Appellant Appendix (“Appellant App.”) 40-46. This Order permitted the treating plant “to recycle and treat waste crude oil obtained from drilling operations, pit oil, swab oil, acid oil, tank bottoms, oil spills, pipeline breaks, skim oil from saltwater disposal tanks, and other waste crude oil related to oil and gas exploration and production.” *Id.* at 44. The Order also provided for the plant to be constructed on the proposed site:

IT IS THEREFORE ORDERED:

- (1) Environmental Driven Solutions, LLC is hereby permitted to operate a waste oil treating plant located in the NE/4 of Section 30, Township 145 North, Range 97 West, Dunn County, North Dakota. Said treating plant shall initially be known as the Environmental Driven Solutions Treating Plant #1 (Facility No. 700085-01).

Id. at 43.

[¶4] EDS had a treatment facility located on the Morlock SWD #1-H site (a saltwater disposal well), separate from, but adjacent to, the Subject Property. Dunn County alleged this operation was in violation of County zoning ordinances. Storage tanks for this facility on the Morlock SWD site had been previously located on the Subject Property. Dunn County sent “Notices of Violation and Orders to Abate” to Seven Star Holdings, LLC,¹ and Shawn Kluver (principal of Seven Star Holdings, LLC and EDS), stating the tanks on the Subject Property violated County zoning ordinances. EDS App. 30-31.

[¶5] Due to this legal dispute, Seven Star Holdings, EDS, and Dunn County entered into an agreement (the “Agreement”), without making any admissions and preserving all available legal defenses. EDS App. 32-34. The Agreement, provided that no construction or operation of the proposed treating plant would occur on the Subject Property until approval from Dunn County was received or upon a final judgment from a court ordering that Dunn County does not have jurisdiction to prohibit the proposed facility. *Id.*

¹ Seven Star Holdings, LLC, was the owner of the property.

[¶6] Without waiving its rights to seek a declaration, EDS alternatively sought approval from the County for the placement of a treating plant. Dunn County's land use code did not permit a treating plant in land zoned Rural Preservation. EDS sought a re-zone of the property to Rural Development, which would have allowed EDS to apply for a conditional use permit ("CUP") for the treating plant. The re-zone request was denied in August 2013 due to insufficient acreage on the proposed re-zone area. Appellant App. 47-49. In July 2014, Dunn County adopted revisions to its land use code. EDS App. 35. These revisions allowed for treating plants in Rural Preservation upon approval of a CUP. *Id.* at 40-41. EDS applied for a CUP under the revised land use code. Dunn County's planning and zoning commission denied an application from EDS for a CUP at its November 14, 2014, meeting. Appellant App. 50.

[¶7] EDS filed a declaratory judgment action against Dunn County in October 2013. Appellant App. 6-11. EDS sought a declaration that NDIC, and not Dunn County, has exclusive jurisdiction and authority to regulate the building, placement, and operation of waste oil treating plants in North Dakota and that the County could not prevent EDS from building and operating a permitted treating plant. Summary judgment was ultimately granted in favor of EDS and the NDIC, which had intervened in the action. Appellant App. 27-38.

[¶8] The NDIC permit for constructing the treating plant remains in full force and effect and has not been rescinded. To the extent, if any, the permit was deemed abandoned or expired as a result of EDS' inability to commence construction or operations, which occurred solely because of Dunn County's threats of criminal and civil penalties, NDIC issued an order granting immediate and retroactive reinstatement of the

previously issued permit for the operation of the treating plant at issue. EDS App. 42-51; Appellant App. 40-46.²

STANDARD OF REVIEW

[¶9] The standard of review is de novo. *Grinnell Mut. Reinsurance Co. v. Thies*, 2008 ND 164, ¶ 5, 755 N.W.2d 852.

LAW AND ARGUMENT

I. NDIC’s comprehensive regulatory scheme concerning oil and gas development and utilization preempts the County’s authority to regulate the disposal of oilfield wastes.

[¶10] It is well-established that North Dakota law grants the NDIC broad and exclusive authority to control and regulate oil and gas development throughout the state. N.D.C.C. § 38-08-04; *see Egeland v. Cont’l Res., Inc.*, 2000 ND 169, ¶ 11, 616 N.W.2d 861 (“The Commission’s powers are continuous and are exclusive”); *Amerada Hess Corp. v. Furlong Oil & Minerals Co.*, 348 N.W.2d 913, 916 (N.D. 1984) (“The Industrial Commission has very broad, general jurisdiction and authority to regulate the production of oil and gas and the oil and gas industry in this State”).

Our Legislature provides the following guidance on the current issue:

The [NDIC] has continuing jurisdiction and authority over *all* persons and property, *public and private*, necessary to enforce effectively the provisions of this chapter. The commission has authority, and it is its duty, to make such investigations as it deems proper to determine whether waste exists or is imminent or whether other facts exist which justify action by the commission. The commission has the authority:

* * *

² To be clear, EDS does not admit or concede that the original NDIC order granting a permit for a treating plant was invalid in any respect.

(2) To regulate:

- a) The drilling, producing, and plugging of wells, the restoration of drilling and production sites, and all other operations for the production of oil or gas....
- e) Disposal of saltwater and oilfield wastes.

N.D.C.C. § 38-08-04(2) (emphasis added).

[¶11] The NDIC has developed regulations pursuant to the specific grant of authority from the Legislature. The fact that the Century Code specifically allows NDIC to regulate the disposal of saltwater and oilfield wastes, as well as all other operations for the production of oil and gas, makes it clear NDIC has exclusive jurisdiction over “all persons and property, public and private” to enforce the provisions contained in N.D.C.C. ch. 38-08.

[¶12] In order to effectuate the purposes and intent of chapter 38-08, N.D.C.C., the NDIC has adopted a comprehensive regulatory scheme for the oil and gas industry, which is promulgated in the North Dakota Administrative Code. *See* N.D.C.C § 38-08-04(5) (NDIC has the authority “to adopt and to enforce rules and orders to effectuate the purposes and the intent of this chapter. . .”); N.D.A.C. art. 43-02-03 (administrative regulations regarding oil and gas conservation adopted by NDIC). Under this comprehensive regulatory scheme, the NDIC has implemented extensive regulations regarding oilfield waste and the construction and operation of treating plants disposing oilfield waste. *See, e.g.,* N.D.A.C. §§ 43-02-03-19.2 (regulations for disposing of waste material), 43-02-03-19.3 (regulations for earthen pits and open receptacles); 43-02-03-51 to 43-02-03-51.4 (regulations for construction and operation of treating plants).

[¶13] According to N.D.A.C. § 43-02-03-01(49),³ a “treating plant” is defined as “any plant permanently constructed or portable used for the purpose of wholly or partially reclaiming, treating, processing, or recycling tanks bottoms or any other waste oils marketable.” EDS’ treating plant, as evidenced by the NDIC’s Order permitting it, will recycle and treat waste crude oil obtained from drilling operations, pit oil, swab oil, acid oil, tank bottoms, oil spills, pipeline breaks, skim oil from saltwater disposal tanks, and other waste crude oil related to oil and gas exploration and production. Such a plant falls under the exclusive jurisdiction of the NDIC. *See* N.D.C.C. 38-08-04(2); *Egeland*, 2000 ND 169 at ¶ 11.

[¶14] In order to construct and operate a treating plant, the NDIC requires compliance with numerous rules and regulations, including regulations for bonding, permitting, siting, and operations of the plant. Before a treating plant can be constructed, an operator is required to obtain a permit from the NDIC after notice and a hearing. In order to obtain the proper permit, a written application stating in detail “the location, type, capacity of the plant contemplated, method of processing proposed, and the plan of operation for all plant waste” must be submitted to the NDIC. N.D.A.C. § 43-02-03-51. Before a plant’s operations can commence, the person proposing to operate a treating plant must secure a surety or cash bond, which remains in force until the operations cease. N.D.A.C. § 43-02-03-15(6).

³ After this action was filed, N.D.A.C. § 43-02-03-01(49) was amended effective April 1, 2014. This amendment is not retroactive and the prior version of the administrative code applies.

[¶15] A review of this comprehensive regulatory scheme shows NDIC has correctly interpreted and applied the authority granted to it by N.D.C.C. § 38-08-04 so as to include the power to regulate treating plants. Because this application of N.D.C.C. § 38-08-04 is practical and consistent with the statutory language, NDIC's interpretation is entitled to deference. See *Anderson v. Workforce Safety & Ins.*, 2015 ND 205, ¶ 22, 868 N.W.2d 508 (because agency's interpretation of statute was "reasonable and consistent with the statutory language," agency was entitled to deference) (citing *Medcenter One, Inc. v. N.D. State Bd. of Pharmacy*, 1997 ND 54, ¶ 17, 561 N.W.2d 634) (an "agency's long-standing and practical interpretation of a statute is entitled to deference" unless it is contrary to the unambiguous language of the statute)); *Americana Healthcare Ctr. v. N.D. Dept. of Human Servs.*, 540 N.W.2d 151, 153 (N.D. 1995) ("An agency has a reasonable range of informed discretion in the interpretation and application of its own regulations, and the agency's expertise is entitled to special deference when the subject matter is complex or technical").

[¶16] The North Dakota Office of Attorney General has also determined that the NDIC has exclusive authority and jurisdiction over the disposal of oilfield waste. "[O]pinions of the Attorney General are entitled to respect, and courts should follow them if they are persuasive." *Riemers v. City of Grand Forks*, 2006 ND 224, 723 N.W.2d 518, 522 (quoting *Edinger v. Governing Auth. of Stutsman County Corr. Ctr. & Law Enf. Ctr.*, 2005 ND 79, ¶ 13, 695 N.W.2d 447).

[¶17] In Letter Opinion 2010-L-01, Feb. 5, 2010, the Attorney General found that state law preempts any attempt by a county to regulate areas that the NDIC has jurisdiction over:

The Industrial Commission has been given the authority to regulate the drilling, producing, and plugging of wells; the restoration of drilling and production sites; and authority concerning "all other operations for the production of oil or gas." These operations include the spacing of wells, the introduction of gas, water, or other substances into producing formations, and the disposal of saltwater and oilfield wastes.

EDS App. 53. In Letter Opinion 90-23, October 5, 1990, the Attorney General stated:

Because of the comprehensiveness of state regulation of oil and gas, I conclude that the North Dakota Legislature intended to preempt local regulation in this area. This conclusion is consistent with an earlier letter issued from this office, which provided in part: "[A] board of county commissioners has no authority to regulate the development, production, or utilization of natural resources of oil and gas in the state of North Dakota." Letter from Nicholas J. Spaeth, Attorney General, to Jay V. Brovold, Billings County State's Attorney (Feb. 7, 1985).

EDS App. 59.

[¶18] After explaining in detail how the Legislature has given the NDIC broad control over the oil and gas industry by way of comprehensive state laws, which preempt local regulation in the area, and further explaining that local governing body's cannot validly enact zoning ordinances that contravene state law, Attorney General Stenehjem answered the specific question posed on whether a county's zoning ordinance may be applied to oil, gas, or saltwater wells that are subject to the NDIC's jurisdiction:

... For counties, even home rule authority "does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency," by which the Supreme Court has interpreted that "the industry or activity involved was already subject to substantial state control through broad, encompassing statutes or rules."

Mountrail County's plan, as stated in your letter, would provide the county planning and zoning board and the Mountrail County Board of Commissioners authority to control the location or even to deny the right to drill an oil, gas, or saltwater well. Its practical function is little different than the county oil drilling permits that were previously determined by this office to be preempted. The comprehensive nature of the Industrial Commission's statutory authority concerning this matter demonstrates the

Legislature's intent to preempt local regulatory authority in this regard. The use of the land at the surface is inherently necessary whenever a well is drilled pursuant to the right granted by a permit from the Industrial Commission. Therefore, it is my opinion that Mountrail County may not apply its zoning ordinances to regulate land usage for the location of oil, gas, or saltwater wells....

EDS App. 55-56 (internal citations omitted).

[¶19] Regulation by the NDIC of North Dakota's development and production of oil and gas resources, which includes the disposal of oilfield waste, preempts local zoning control. In Attorney General Opinion 94-F-15, it was explained that "[t]he preemption doctrine is based upon the proposition that a city, as an agent of the state, cannot act contrary to the state." EDS App. 66. "In general, preemption may be either expressed or implied. Implied preemption occurs when a statute does not expressly state that its regulation is exclusive, but when nevertheless, an intent to preempt local regulatory authority is implied from the whole scope and purpose of the statutory scheme." *Id.* The Legislature's enactment of such a comprehensive state regulation over the disposal of saltwater and oilfield wastes, and its placing authority over the same with the NDIC, is clear indication of the intent to preempt local regulatory authority.

[¶20] Further, this Court has held that "[a]lthough counties have general authority to enact zoning ordinances ... a local governing body cannot validly enact a zoning ordinance that contravenes federal or state law." *Mountrail Cnty. v. Hoffman*, 2000 ND 49, 607 N.W.2d 901, 903-04. Dunn County's attempt to regulate "Industrial Activities" and "Oilfield Waste Treatment Facilities" in its Land Development Code, as amended, is contrary to state law.

[¶21] Dunn County has authority to regulate “the location and use of buildings and structures and the use, condition of use, or occupancy of lands for residence, recreation and other purposes” under N.D.C.C. § 11-33-01. This general grant of authority, however, yields to the specific authority granted to the NDIC to regulate the disposal of oilfield waste, operations for the production of oil and gas, and to adopt and enforce rules and orders necessary to accomplish such regulation. N.D.C.C. 1-02-07 (“Whenever a general provision in a statute is in conflict . . . with another statute, . . . the special provision must prevail and must be construed as an exception to the general provision. . .”); *see Steen v. Fay*, 66 N.W.2d 528, 530 (N.D. 1954) (when a statute dealing comprehensively and exclusively with a special subject is in irreconcilable conflict with a prior and more general enactment, the later and more specific statute prevails).

[¶22] The regulation of treating plants falls within the comprehensive regulatory scheme implemented by NDIC; local authority to regulate the construction and operation of treating plants is preempted by the authority granted to NDIC. *See State v. Brown*, 2009 ND 150, ¶ 21, 771 N.W.2d 267 (local authority to regulate an industry or activity is limited when “the industry or activity involved is already subject to substantial control through broad, encompassing statutes or rules”); N.D. Op. Att’y Gen. 2010-L-01, EDS App. 56 (“The comprehensive nature of the Industrial Commission’s statutory authority concerning this matter demonstrates the Legislature’s intent to preempt local regulatory authority [in regard to land usage for the location of oil, gas, and saltwater wells.]”); N.D. Op. Att’y Gen. 90-23, EDS App. 58-59 (Oct. 5, 1990) (“[W]here a comprehensive statute is intended to be the exclusive means of regulation,

no specific conflict between state and local law is necessary for the state law to preempt local regulations”).

[¶23] Dunn County is arguing that the NDIC should share jurisdiction as to other areas the NDIC regulates. Using this same logic, nothing would stop Dunn County (or others) from arguing, by extension, that placement of wells or saltwater disposal wells are regulated by a shared jurisdiction of local zoning and NDIC regulation. Dunn County is effectively advocating for an end to NDIC exclusive regulation over the oil and gas industry in North Dakota. While unstated by Dunn County, this is the true prize that is sought from this Court. A decision in favor of Dunn County will give rise to a form of local control that will take precedent over the orderly development of North Dakota’s oil and gas resources that the NDIC currently exclusively maintains. While Dunn County may deny that it would use its logic to flow to this endpoint, the logic of Dunn County, if it is successful on appeal, undeniably and naturally flows to the result of a shared jurisdictional regulatory scheme between the NDIC and local county and city governments for all regulation of the oil and gas industry in North Dakota. This logic should be rejected by the Court.

[¶24] Dunn County has attempted to mischaracterize the plant’s proposed purpose when it argues that EDS does not propose to dispose of oilfield wastes. EDS is proposing to dispose of oilfield waste:

(20) EDS testified they are utilizing tanks set up on the Morlock SWD #1-H well site to accept reject water from the Morlock SWD #1-H well and other saltwater disposal wells to let the solids settle. The water is then filtered, the water disposed of in the Morlock SWD #1-H well, and the solids taken to a thermal treatment facility.

* * *

(8) Said treating plant is hereby permitted to recycle and treat waste crude oil obtained from drilling operations, pit oil, swab oil, acid oil, tank bottoms, oil spills, pipeline breaks, skim oil from saltwater disposal tanks, and other waste crude oil related to oil and gas exploration and production. Waste crude oil does not include used lubricating oil, hydraulic oil, or refinery waste.

Appellant App. 42, 44. The EDS facility would process oilfield waste and dispose of it. This is also clear from EDS's application, which describes what EDS will do with the waste. EDS App. 1-29. The definition of "dispose" is "to get rid of." WEBSTER'S NEW COLLEGIATE DICTIONARY 327 (1981). That is exactly what EDS would do with the oilfield waste it processes—whether disposing of saltwater at the adjacent Morlock SWD, recycling oil for resale, or disposing of remaining waste through the process stated in its application and approved by NDIC.

II. Legislative History

[¶25] There has been no claim that N.D.C.C. § 38-08-04 is ambiguous. The statute is clear. Legislative history has no application here. *Sorenson v. Felton*, 2011 ND 33, ¶ 16, 793 N.W.2d 799.

III. Dunn County is Precluded from Collaterally Attacking NDIC's Order Approving the Construction and Operation of the Treating Plant.

[¶26] Although Dunn County does not explicitly challenge the validity of NDIC's order approving the construction and operation of the treating plant, it has made a veiled attempt to collaterally attack numerous aspects of NDIC's order. In arguing that NDIC lacks authority to regulate the treating plant at issue, Dunn County takes exception with the process undertaken to approve EDS' application to construct and operate the treating plant in the proposed location. For instance, Dunn County claims that in reaching its decision, NDIC did not properly consider the county's comprehensive plan

for land use—this despite the fact the treatment plant would literally be next to a saltwater disposal well. Appellant Brief, ¶¶ 36-38. Furthermore, Dunn County attacks NDIC’s decision to approve EDS’ treating plant by arguing that Dunn County’s zoning hearing process provides better notice to Dunn County landowners and that it is in a better position than NDIC to regulate treating plants. It is noteworthy that while residents of Dunn County did provide comment to the NDIC concerning EDS’ application, Dunn County did not. EDS App. 15-16. Dunn County should be precluded from collaterally attacking the NDIC order at issue. *Amerada Hess Corp.*, 348 N.W.2d at 917.

[¶27] The doctrine of administrative res judicata precludes collateral attacks on administrative agency decisions and serves to protect successful parties from duplicative proceedings. *Lamplighter Lounge, Inc. v. State ex rel. Heitkamp*, 510 N.W.2d 585, 591 (N.D. 1994); *Amerada Hess Corp.*, 348 N.W.2d 913 (N.D. 1984)). Administrative res judicata is “simply the judicial doctrine of res judicata applied to an administrative proceeding.” *Lamplighter Lounge, Inc.*, at 591.

[¶28] According to N.D.C.C. § 38-08-14(1), a party who is “adversely affected by an order entered by [NDIC] may appeal, pursuant to chapter 28-32, from the order to the district court for the county in which . . . the affected property is located.” Upon appeal to the district court, the order or decision will be upheld only if the district court finds the NDIC “has regularly pursued its authority and its findings and conclusions are sustained by law and by substantial and credible evidence.” N.D.C.C. § 38-08-14(3). Because NDIC is an administrative agency, and North Dakota law provides a remedy to obtain adequate relief against the enforcement of its orders or decisions, the doctrine of administrative res judicata applies to the decisions it renders. *Schank v. North Am.*

Royalties, Inc., 201 N.W.2d 419, 432 (N.D. 1972) (“[T]he Industrial Commission is an administrative agency. . .”). Dunn County could have appeared at the NDIC hearing, like others did, and object to the publically noticed hearing.

IV. Local, state and federal laws are not affected by the placement of EDS’ plant on the proposed site.

[¶29] The NDIC Order provides that “treating plants must comply with all applicable local, state and federal laws and regulations.” Appellant App. 42. This clause in the Order does not relate to the placement or existence of the plant itself. If this clause was meant to address the placement or existence of EDS’ plant, the Order would contradict itself due to the fact that the Order otherwise approves the construction, operation, and the placement of the plant on the subject property.

[¶30] The language in the NDIC Order at paragraph 19 pertains to other types of activity that are not regulated by the NDIC. Appellant App. 42. Activities such as a truck wash or a man camp on the property would potentially be regulated by local, state, or federal regulations—areas the NDIC does not regulate. The language in paragraph 19 does not pertain to a restriction on placement of a treating plant because the very purpose of the NDIC Order is to give EDS the authority to place the treating plant in the location sought.

[¶31] Where does NDIC regulation of a treating plant stop then? It stops at the treating plant construction and operation—which is all that is being presented to this Court by EDS. NDIC jurisdiction of a treating plant does not cover placement of other unrelated facilities on the property. NDIC does not have jurisdiction when permitting a treating plant for a truck wash to be placed on the property, as Dunn County has

suggested could be possible. This is why NDIC placed the proviso in its Order that EDS must comply with federal, state, and local laws. Ancillary facilities, such as employee housing, truck washes, or vehicle repair facilities do not directly relate to the disposal of oilfield waste. While an argument *could* be made (as is true for nearly everything) that such facilities would indirectly be needed, such is a weak argument and, more importantly, is not an argument advanced by EDS. EDS is asking the Court to affirm the district court's conclusion that NDIC exclusively regulates treating plants and treating plants only.

CONCLUSION

[¶32] EDS respectfully requests the Court to affirm the district court's order granting EDS summary judgment.

Dated this 25th day of August, 2016.

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IN THE SUPREME COURT
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Supreme Court No. 20160100

Dunn County
No. 13-2013-CV-100

AFFIDAVIT OF MAILING

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 25 day of August, 2016, she mailed a copy of the foregoing *Appellee's Brief* and *Plaintiff/Appellee's Appendix* by placing a true and correct copy thereof in an envelope, addressed to the following:

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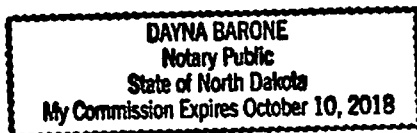
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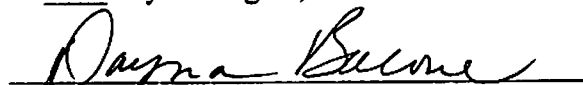
Aaron G. Birst ✓
ND Association of Counties
1661 Capitol Way
Bismarck, ND 58502

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.


Annette Kirschenheiter

Subscribed and sworn to before me this 25th day of August, 2016.




Notary Public